

**THE FOURTH HOUR:
SUPPORTS AND SERVICES:
UNDERPINNING THE LESS RESTRICTIVE ALTERNATIVES**

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TABLE OF CONTENTS

I. INTRODUCTION	4
II. AVOIDING GUARDIANSHIP OF THE PERSON	
1. Emergency Protective Order (“EPO”).....	4
2. Surrogate Decision-Making (“SDM”).....	4
3. Surrogate Decision-Making - Intellectually Disabled	5
4. Surrogate Decision Making for Minors When Parent Unavailable.....	5
5. Authorization Agreement for Non-Parent Relative.....	5
6. Supported Decision-Making Agreements	5
7. Emergency Medical Treatment Act.....	5
Emergency Medical Treatment of Minors	5
8. Managing Conservatorship.....	5
9. School Admission Procedures.....	6
10. School Admission Procedures (Grandparents).....	6
11. Mental Health Services	6
12. Driving Issues: Katie’s Law and the Re-Test Request	6
13. Mental Illness Diversion Programs (Criminal Courts).....	6
III. ADVANCED MEDICAL DIRECTIVES	
The Federal Patient Self-Determination Act.....	6
14. Medical Power of Attorney	6
15. Directive to Physicians and Family or Surrogates ("Living Will").....	7
Intractable Pain Treatment Act	7
16. Out-of-Hospital DNR (“EMT-DNR”).....	7
17. End-Stage Planning: The Patient’s Intent, If Known	7
IV. AVOIDING GUARDIANSHIP OF THE ESTATE	
18. Durable Power of Attorney	7
19. Convenience Accounts	8
20. Sophisticated Tax Planning	8
21. Inter Vivos (“Living”) Trusts	8
22. §142 Trusts	8
23. Testamentary Trusts	8
24. Guardianship Management Trusts.....	8
25. Pooled Trust Subaccounts	9
26. Special Needs/ Medicaid Qualification Trusts	9
27. Trusts for Intellectually Disabled Persons.....	9
28. Community Administrator	9
29. Court Registry	9
30. Payment of Non-Resident Creditor	10
31. Sale of Minor's Interest in Property.....	10
32. Sale of Adult Ward's Interest in Property.....	10
33. Mortgage of Minor’s Interest/ Minor Ward's Interest in Property	10
34. Uniform Transfers to Minors Act.....	10
35. Receivership	10
36. Order of No Administration	11
37. Representative Payee.....	11
38. Veteran's Benefits Fiduciary	11
39. Payment of Employees Retirement System Funds to Parent of Minor	11

40. International Treaty	11
41. Suit by Next Friend	11
42. Social Service Agencies	11
43. Geriatric Care Manager	12
V. LIMITING THE EFFECT OF THE GUARDIANSHIP	
44. Pre-Need Designation of Guardian	12
45. Pre-Need Designation of Guardian by Parent	12
46. Pre-Need Declaration - Mental Health	13
47. Safekeeping ("Freeze") Agreements	13
48. Restoration of Ward	13
49. Annual Determination	13
50. Emancipation of Minor Ward.....	13
51. Enumeration of Powers in Guardianship Order	13
52. Interstate Guardianships	13
53. Negligible Estate	13
54. Minor Ward's Estate <\$100,000	14
55. Mediation and Family Settlement Agreements	14
56. Mother Nature and Father Time	14
VI. SUPPORTS AND SERVICES	
1. Examples of Entities or Organization providing Supports or Services	14
2. Types of Supports and Services	15
A. Food, Clothing, or Shelter.....	15
B. Physical or Mental Health Food, Clothing, or Shelter.....	15
C. Manage Financial Affairs Food, Clothing, or Shelter.....	15
D. Personal Decisions: Residence, Voting, Operating a Motor Vehicle, & Marriage.....	15
Appendix A. Statement of Intent for End-of-Life Planning.....	16

LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP
&
SUPPORTS AND SERVICES

I. INTRODUCTION

By 2030, the population 65+ will grow to 20% of the total US population. By 2040, the number of individuals over age 85 is expected to triple. Declining mortality rates, the impact of improving medical technologies, and the wave of Baby Boomers all contribute to a reasonable conclusion that the need for guardianship services will parallel the growth of the 50+ population. These demographic trends are converging to create an unprecedented increase in guardianships, and state and county courts are faced with the responsibility of ensuring their Wards receive appropriate care.

The number of active guardianships in Texas (currently estimated to be between 50,000 and 100,000) has already increased significantly in the last four years. This dramatic increase, coupled with the certainty of more guardianship needs in the future, makes it imperative that steps are taken to ensure the guardianship system in Texas is not overburdened.

To that end, continued legislative activity in this area has resulted in increasing scrutiny of both the rights of those under guardianship and practical considerations as to how the impact of a full guardianship might be avoided or lessened.

In addition to the policy statement contained in TEX. EST. CODE §1001.001, mandating the use of a less restrictive alternative, there is now a statutory definition of "Alternatives to Guardianship" TEX. EST. CODE §1002.0015, which offers a non-exclusive list of alternatives:

1. medical power of attorney (14 below);
2. durable power of attorney(18 below);
3. declaration for mental health treatment (46 below);
4. representative payee (37, 38 below);
5. joint bank accounts (convenience accounts) (19 below);
6. guardianship management trust(24 below);
7. special needs trust (26 below);
8. pre-need designation of guardian(45 below); and
9. person-centered decision-making (6 below).

The alternatives suggested herein are, in some instances, designed to provoke further thought. This is

certainly not an exclusive list.

Closely allied to the concept of less restrictive alternatives is the idea of Supports and Services, addressed below.

II. AVOIDING GUARDIANSHIP OF THE PERSON

1. Emergency Protective Order (“EPO”) TEX. HUM. RES. CODE § 48.208 - A procedure to remove a person lacking capacity to consent to medical services from a situation posing an immediate threat to life or physical safety. Adult Protective Services files a verified petition and an Attorney Ad Litem is appointed. On a finding of probable cause by the probate court of the threat and lack of capacity, the person is removed to treatment and examined within 72 hours. The removal may last no longer than 72 hours unless extended by the court for up to 30 days. An application for temporary and permanent guardianship usually follows.

2. Surrogate Decision -Making (“SDM”) – TEX. HLTH. & SAF. CODE § 313.001-.007 – For **non-emergency** medical decisions to be made for incapacitated individuals who are either in a hospital or nursing home without the necessity of a guardianship.

Decision-Maker Priority: 1) the patient's spouse; 2) an adult child of the patient with the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker; 3) a majority of the patient's reasonably available adult children; 4) the patient's parents; or 5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

Limitations on consent: Surrogate decision-maker cannot consent to: 1) voluntary inpatient mental health services; 2) electro-convulsive treatment; 3) the appointment of another surrogate decision-maker; 4) emergency decisions; or 5) end-of-life decisions (extending or withdrawing life support).

SDM does not: 1) replace the authority of a guardian nor an agent under a medical power of attorney; 2) authorize treatment decisions for a minor

unless the disabilities of minority have been judicially removed; 3) authorize patient transfers under Chapter 241 of the Health and Safety Code.

Withdrawal of Life Support: for provisions concerning withdrawal of life support where no Directive to Physicians has been executed, and in situations where there is no guardian, see TEX. HLTH. & SAF. CODE § 166.039.

3. Surrogate Decision Making for Intellectually Disabled TEX. HLTH. & SAF. CODE § 597.041 – A more specialized form of surrogate decision-making, this statute allows SDM Committees to act for individuals with intellectual and development disabilities (IDD) who reside in an intermediate care facility for the mentally retarded (ICF/IDD) – Allows medical and non-medical decisions to be made by the committee.

4. Surrogate Decision-Making for Minors When Parent Unavailable TEX. FAM. CODE § 32.001ff - consent to dental, medical, psychological, and surgical treatment of a child by persons authorized in statute.

5. Authorization Agreement for Non-Parent Relative TEX. FAM. CODE Ch. 34 - A parent may authorize a grandparent, adult sibling or adult aunt or uncle to have decision-making authority for a minor child for: healthcare, insurance coverage, school enrollment, school activities, driver's education, employment and application for public benefits. This essentially authorizes the designee to do anything a guardian of the person could do.

The official form, promulgated by the Texas Department of Family and Protective Services and identified as "Form 2638", can be accessed at: https://www.dfps.state.tx.us/site_map/forms.asp and selecting "Form 2638."

6. Supported Decision-Making Agreements TEX. EST. CODE Ch. 1357 - Somewhat similar to a Power of Attorney, it is an agreement between 1) an adult with disabilities regarding his or her Activities of Daily Living ("ADLs"), but who is not incapacitated and 2) a "Supporter" who is willing to assist in: 1) understanding the options, responsibilities, and consequences of the life decisions, without actually making those decisions for the disabled adult and without impeding the adult's self-determination; 2) obtaining the relevant information necessary (health, financial, or educational - the adult may execute HIPAA or similar releases to facilitate the information gathering); 3) understanding the information gathered;

and 4) communicating those decisions to the appropriate persons.

The "life decisions" could include decisions regarding obtaining food, clothing, and residence and cohabitation choices; the supports, services, and medical care to be received; financial management assistance; and workplace choices.

Such an agreement extends until terminated by either party or by the terms of the agreement or if the Department of Family and Protective Services validates findings of abuse, neglect, or exploitation by the Supporter against the adult or the Supporter is found criminally liable for such actions.

A permissive form is supplied in the statute. The agreement must be signed by both the disabled adult and the Supporter either in the presence of two or more subscribing witnesses (above age 14) or a notary public.

7. Emergency Medical Treatment Act TEX. HLTH. & SAF. CODE § 773.008 - In certain limited circumstances involving emergency situations, consent to medical treatment does not have to be given, it is implied. Hospital emergency rooms could not function if consent had to be secured beforehand. **Emergency treatment of minors** - Consent is also implied for the treatment of a minor who is suffering from what reasonably appears to be a life-threatening injury or illness (even if they can communicate) if the minor's parents, conservator, or guardian is not present. TEX. HEALTH & SAFETY CODE § 773.008(3).

8. Managing Conservatorships TEX. FAM. CODE Ch. 153 - **Functional equivalent to Guardian of the Person** Especially for families involved in a divorce context, a conservatorship may be used in place of a guardianship of the person for a minor, but only when there is no issue of assets belonging to the minor children.

Check the small print - The divorce decree, if there is one, should be carefully examined regarding any management powers granted either spouse regarding property of the children. TEX. FAM. CODE §153.132 grants a parent appointed sole managing conservator essentially the full rights of a guardian of the person and in TEX. FAM. CODE §153.073, the right to manage the property of the child "to the extent that the estate has been created by the parent or the parent's family." The Family Code provides no monitoring mechanism for property management.

9. School Admission Procedures TEX. EDUC. CODE §25.001(d) – Under §25.001(d) of the

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